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Nº. 00-99

In The

Supreme Court of the United States

IN RE: MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, ET. AL.,
Petitioner,

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

DISCUSSION

At the outset, the last two paragraphs of Respondents' "Statement of the Case" are not accurate and may have misleading interpretation. The Respondents' Brief in Opposition at page 2 attempts to summarize the district court's January 21, 2000 Opinion and Order [Appendix 3-1 of Petition] as follows: "(1) there is a genuine issue of material fact regarding the extent to which the MHSAA exerts control over interscholastic athletics; and (2) the MHSAA is a state actor and thus bound by the Equal Protection Clause. Pet. App. 3-1 to 3-38."

Petitioner has requested appellate relief for the very reason that while the district court holds at Appendix 3-23 "The evidence presented reveals a genuine issue of material fact regarding the extent to which the MHSAA exerts control over interscholastic athletic" (giving the illusion that denial of the Motion to Dismiss was interlocutory), that ruling is clearly at odds with the prior paragraph of the same ruling which in fact sets the **law of the case** and forms the foundation for petitioners' contention that the ruling is in fact a conclusive determination and comports with requirements of the collateral order doctrine exception bringing this matter within the ambit of 28 U.S.C. §1291:

> "While the regulation of interscholastic athletics under Michigan statutory law is "non-delegable," the local school districts have delegated it to defendants. Having delegated that duty, the local school districts have now lost the power to control interscholastic athletics independent from the MHSAA."

Does the holding set the **law of the case** as a legal conclusion? The answer is yes.

Does this language describe a genuine issue of material fact for later decision? The answer is no.

Does this language describe a purely interlocutory ruling that may change during the course of trial? The answer is no.

Does the language comport with the requirements of a collateral order qualifying it for review pursuant to 28 U.S.C. §1291? The answer is yes.

Respondents' Brief in Opposition claims that the district court Order does not decide conclusively whether the MHSAA is subject to 20 U.S.C. §1681 (Title IX). Appendix 3-16, paragraph two begins:

> "To resolve this disagreement (of controlling authority) this court . . ."

and proceeds for the next eight pages, including a lengthy footnote, to decide the very issue against the MHSAA and thus set **the law of the case**.

If the MHSAA is within the reach of 20 U.S.C. § 1681 (Title IX) as a conclusion of law, what difference or

relevance are facts that go to the extent of control. In short, no trial is needed as there are no issues of material fact – the Court already has decided the issue conclusively. **The law of the case** has been set and an issue separate from the merits of the discrimination case has been decided and the jurisdictional requirements of 28 U.S.C. §1291 have been satisfied.

Respondents further advance the proposition that Petitioners' 28 U.S.C. §1291 jurisdictional analogy to immunity must fail. Respondents place significant reliance on *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 114 S. Ct. 1992, 128 L.Ed. 2d 842 (1994) to defeat Petitioners' jurisdictional analogy. Respondents' reasoning, however, is misplaced.

First, *Digital Equipment, supra,* is the first case cited by Petitioner in support of its claim of jurisdictional analogy pursuant to 28 U.S.C. §1291. (Petition for Writ page 9).

Second, this Court in *Digital Equipment, supra,* repeatedly stated that the issue surrounding constitutional or statutory provisions entitling a party to immunity from suit are immediately appealable pursuant to 28 U.S.C. §1291. The explicit statutory provision relied upon by Petitioner is 20 U.S.C. §1681 (a) which states as follows:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal financial assistance . . ."

The lynch pin required to stand trial on charges of violation of 20 U.S.C. §1681 et. seq. (Title IX) is receipt of federal money. All parties agree that the MHSAA is not a recipient of federal financial assistance.

Notwithstanding the governing legal precedent:

- *National Collegiate Association v. Smith*, 525 U.S. 459, 119 S. Ct. 924, 142, L.Ed. 2d 929 (1999) which holds that only recipients of federal funds fall within the reach of Title IX,

- *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed 2d 831 (1999) which holds that the federal government's enforcement power under 20 U.S.C. §1681 may only be enforced against funding recipients,

- the Sixth Circuit Court of Appeals holding in *Soper v. Hoben*, 195 F. 3d 845 (6th Cir. 1999), which holds that only recipients of federal funds may be liable under Title IX,

- and the guidance of the reasoning in *Cureton v. The National Collegiate Athletic Association*, 198 F. 3d 107, 118 (3d Cir. 1999) wherein the Third Circuit stated:

> "Furthermore, we cannot understand how the fact that the NCAA promulgates rules and regulations with respect to intercollegiate

athletics somehow means that the NCAA has controlling authority over its members' programs or activities receiving federal financial assistance. After all, the institutions decide what applicants to admit, what employees to hire, and what facilities to acquire;"

- and notwithstanding the Michigan Supreme Court's ruling in *Kirby v. The Michigan High School Athletic Association*, 459 Mich 23 (1998) holding that the MHSAA exercises no independent authority over its member schools,

the trial court concluded as a matter of law that the MHSAA must stand trial on 20 U.S.C. §1681 et. seq. issues. That ruling is clearly erroneous and must be either subject to mandamus under FRCP 21 or be a matter directly appealable pursuant to 28 U.S.C. §1291 on the basis of the referenced statutory provision.

Lastly, Respondents concede (by failure to address the same) that the refusal of the district court to follow binding precedent constitutes a usurpation of judicial authority requiring mandamus. The Sixth Circuit's refusal to act under this circumstance is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.

CONCLUSION

For the above stated reasons the Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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